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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Shasta)**

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THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON SCOTT SMITH,

Defendant and Appellant.

C068811

(Super. Ct. Nos. 08F8573,  
10F5720, 10F8109)

In this appeal, defendant Brandon Scott Smith asks us to dismiss a two-year sentence enhancement that was imposed upon him for committing a felony while out on bail. (Pen. Code, § 12022.1.)<sup>1</sup> We agree with the parties that, because defendant was not ultimately convicted of a felony for the original crime,

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<sup>1</sup> Undesignated statutory references are to the Penal Code. Effective January 1, 2012, former section 12022.1 was repealed and reenacted without substantive change. (Stats. 2010, ch. 711, § 4 [repealed]; Stats. 2010, ch. 711, § 5 [reenacted].)

the sentence enhancement was improperly imposed in the subsequent case and must be reversed.

### **FACTUAL BACKGROUND**

In case No. 08F8573, defendant was charged with two counts of possessing controlled substances (cocaine and methadone); it was also alleged he committed the crimes while on bail in case No. 07F9585. Defendant pleaded guilty to possessing cocaine, and admitted he was on bail when the offense was committed. Entry of judgment was deferred. The plea further provided that imposition of the two-year on-bail enhancement "shall be dependent upon the resolution of [case No.] 07F9585" and, should defendant be "acquitted on all felony counts in [case No.] 07F9585, then by law that [section] 12022.1 would be dismissed."

Thereafter, defendant was convicted in case No. 07F9585 of a single theft misdemeanor.

Judgment was subsequently entered in case No. 08F8573, at the same time as defendant pleaded guilty in case No. 10F5720 to possessing methamphetamine; defendant received probation in both cases.

When, ultimately, defendant pleaded guilty to two counts of first degree residential burglary and receiving stolen property in case No. 10F8109, he also admitted violating his probation in case Nos. 08F8573 and 10F5720, in exchange for a maximum sentence of nine years in state prison. The court denied defendant's request at sentencing that it strike the on-bail enhancement, and sentenced defendant to a total of nine years;

one component of that sentence was the two-year consecutive on-bail enhancement admitted in case No. 08F8573.

### **DISCUSSION**

Defendant argues the on-bail enhancement must be stricken because he was not convicted of a felony offense for the "primary offense," i.e., the offense charged in case No. 07F9585. He also argues that the terms of his plea agreement in case No. 08F8573 required the trial court, under these circumstances, to dismiss the enhancement. Both assertions are correct.

The statutory scheme establishing the on-bail enhancement employs special terminology: A "primary offense" means a felony offense for which the offender is on bail or released on his own recognizance; a "secondary offense" refers to the felony committed while the defendant is on bail for the primary offense. (§ 12022.1, subd. (a)(1), (2).) If the person "*is convicted of a felony for the primary offense . . . and is convicted of a felony for the secondary offense,*" the sentence for the secondary offense is to run consecutive to the primary sentence. (§ 12022.1, subd. (e), italics added; *In re Ramey* (1999) 70 Cal.App.4th 508, 512.) The statute contemplates occasions, as here, where the defendant may be convicted of the secondary crime prior to trial on the primary offense; in such instances, "the imposition of the enhancement shall be stayed pending imposition of the sentence for the primary offense. . . ." (§ 12022.1, subd. (d).)

Our Supreme Court has unequivocally stated that a felony conviction for the criminal charge on the primary offense is an essential prerequisite to the imposition of the "'on bail' enhancement." (*In re Ramey, supra*, 70 Cal.App.4th at p. 512, citing *In re Jovan B.* (1993) 6 Cal.4th 801, 814; *People v. McClanahan* (1992) 3 Cal.4th 860, 869-870; see also *People v. Vega* (1990) 224 Cal.App.3d 506, 520 [section 12022.1 "has no life until and unless the primary offense is a final felony conviction"].)

When, as here, the accused is ultimately convicted in the primary offense case of a misdemeanor only, "[l]ike the Cheshire Cat, the felony count disappeared from sight, leaving nothing behind but a mischievous grin." (*In re Ramey, supra*, 70 Cal.App.4th at p. 512.) Here, a term of defendant's plea bargain in case No. 08F8573, in which the on-bail enhancement was alleged, provided that the on-bail enhancement would be dismissed if defendant were not convicted of a felony in case No. 07F9585. He was not; the enhancement should have been dismissed.

### **DISPOSITION**

The portion of the judgment imposing a two-year consecutive period of imprisonment pursuant to section 12022.1 is reversed, and defendant's sentence shall be modified accordingly. The judgment is affirmed in all other respects. The trial court is directed to prepare an amended abstract of judgment that accurately reflects defendant's modified sentence and to forward

a certified copy of the amended abstract to the Department of  
Corrections and Rehabilitation.

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BUTZ, J.

We concur:

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BLEASE, Acting P. J.

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NICHOLSON, J.